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In The

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The California Supreme Court

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a non-profit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The instant case involves the standard to be applied to a broad range of regulatory takings cases throughout the country.

The issues presented in this case go to fundamental questions about the nature and exercise of governmental power in a highly regulated, modern state and the rights of individuals faced with such enormous power. The Institute's brief addresses the confusion and conflicts among federal and state courts on how to evaluate regulatory takings claims.

The Institute for Justice has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk.[1]

STATEMENT OF THE CASE

The facts of the case have been well stated in the petitioner's brief petitioning for certiorari (Petition for Writ of Certiorari at 2-13) and are summarized here only insofar as is necessary to illuminate the critical legal

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

issues. Petitioner Santa Monica Beach, Ltd., owns a 12-unit apartment building in the City of Santa Monica that is subject to rent controls. The City of Santa Monica instituted rent control in 1979 with the stated purpose of increasing the supply of housing for the poor, minorities, students, young families, and senior citizens. Petitioner admits that these are legitimate government interests.

When the City of Santa Monica refused petitioner's requests for rent increases, petitioner sued, arguing that the rent regulations effected a regulatory taking. Petitioner offered to prove that, far from achieving their stated purposes, the rent regulations have had the opposite effect from these supposed purposes.

The California Superior Court held that rent regulations were subject only to rational basis review and that the regulations were rational. The California Court of Appeals reversed, holding that all regulatory takings are reviewed under the *Nollan* substantial advancement test and that petitioner had stated a cause of action under this test. The California Supreme Court again reversed. It limited the application of the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) test and held that rent regulations receive only the equivalent of rational basis review.

SUMMARY OF ARGUMENT

The California Supreme Court held that the heightened scrutiny standard of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) [hereinafter *Nollan*] and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) [hereinafter *Dolan*]

does not apply to a generally applicable rent control law. Instead, it held that such laws are subject to what amounts to rational basis review.[2] The court explained that "the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration." In effect, individualized or adjudicative decisions must substantially advance a legitimate governmental interest, but generally applicable or legislative rules that infringe on property rights receive only the most minimal scrutiny. *See Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1001 (Cal. 1999).

Petitioner for certiorari point out that this holding conflicts with rulings of the United States Court of Appeals for the Ninth Circuit and the New York Court of Appeals. But the California Court's misreading of *Nollan* and the multiplicity of opinions in this case are symptomatic of widespread confusion among state and federal courts about how to apply the substantial advancement test to a variety of property restrictions. This case provides a clean, clear fact situation to address these important issues that go to the core of the relationship between individuals and the state.

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[2] Citing *Dolan*, the court held that "the party challenging rent control must show 'that it constitutes an arbitrary regulation of property rights'." *Santa Monica Beach, supra*, 968 P.2d at 1002. This standard is identical to rational basis review, under which courts almost always defer to the legislature. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) ("[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand constitutionally with the Fourteenth Amendment").

In addition, the California Supreme Court's decision leaves most California residents without a forum to vindicate their federal constitutional rights as articulated in *Nollan*. The Ninth Circuit has previously foreclosed most challenges to state violations of property rights in federal court. And now, although property owners may bring claims for just compensation, they may no longer bring a claim that property regulation does not substantially advance a legitimate governmental purpose in California state courts either.

For these reasons, *amicus curiae* Institute for Justice respectfully suggests that this court grant certiorari and clarify the proper standard of review for regulatory takings in the United States.

ARGUMENT

I. THERE IS WIDESPREAD CONFUSION AMONG STATE AND FEDERAL COURTS ABOUT HOW TO APPLY *NOLLAN'S* SUBSTANTIAL ADVANCEMENT STANDARD TO PROPERTY REGULATION.

Four years ago, Justices Thomas and O'Connor noted that "[t]he lower courts are in conflict over whether Tigard's test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature." *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

The instant case also presents the question of whether property regulations receive a different type of review than individual decisions about property made by

governmental entities. The various state and federal opinions are riddled with different standards of judicial review. Some adopt rational basis; some treat substantial advancement as a slightly higher standard than rational basis in some situations with a heightened review in certain other situations. Some courts distinguish between adjudicatory and legislative decisions; others distinguish between exactions and use limitations. There is no consistent standard in the lower courts.

If a regulation that limits the exercise of property rights is permissible even when it has the opposite effect of the purported purpose, then that judicial review represents the very lowest form of scrutiny possible. As pled by petitioners, the rent control law does not advance its purpose at all; it retards it. While it is perhaps possible that "the State could rationally have decided that the measure adopted might achieve the State's objective," this Court explicitly rejected the notion that such a calculation fulfills the substantial advancement test. *See Nollan*, 483 U.S. 825, at 836 n.3.

Pennell v. City of San Jose, 485 U.S. 1 (1988) and *Yee v. City of Escondido*, 503 U.S. 519 (1992) are the other major takings cases, besides *Dolan*, decided by this Court after *Nollan*. Neither resolved the issues arising in this case, however. Both were facial challenges, and this Court rejected the *Pennell* challenge on the grounds that the ordinance in question would have to be challenged as applied. *Yee* involved a challenge to an ordinance as a physical taking, and the Court ruled that there was no physical taking but suggested that there might be a regulatory taking. The Court noted that certain features of the law might "have some bearing on whether the ordinance

causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee*, 503 U.S. at 530. There was no opportunity in either *Pennell* or *Yee* to apply the substantial advancement standard, although *Yee* certainly implies that it would apply to a rent control ordinance and that a nexus between means and effect would be required.

Many cases acknowledge that the substantial advancement standard should be applied to legislation that takes property by regulation. *See, e.g., Chang v. United States*, 859 F.2d 893, 896 (Fed. Cir. 1988) (applying *Nollan* standard to regulatory taking under the Libyan Sanction Regulations); *Outdoor Systems, Inc. v. City of Tucson*, 997 F.2d 604, 615-16 (9th Cir. 1993) (applying *Nollan* standard to zoning regulations); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (applying *Nollan* and *Dolan* to legislation imposing impact fees on new development).

There remains, however, considerable confusion about when a regulation substantially advances its purpose and what constitutes a sufficient nexus between ends and means. *See Nollan*, 438 U.S. at 837. Some cases appear to give serious consideration to the nexus between the regulation's purpose and effects. *See, e.g., Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (portion of opinion not joined by other judges) (explaining that regulation substantially advances purpose of deer herd maintenance by directly preserving habitat and being based on "sound" game management theory), *cert. denied*, 507 U.S. 987 (1993); *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (finding

insufficient nexus between declared purpose of statute and effects), *cert. denied*, 493 U.S. 976 (1989); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994) (same), *cert. denied*, 514 U.S. 1109 (1995). The state of Washington applies heightened scrutiny analysis to all regulatory takings claims and looks carefully at the relationship between the purpose of the ordinance or governmental action and the means used to achieve it. *See, e.g., Henderson Homes, Inc. v. City of Bothell*, 877 P.2d 176, 177 (Wash. 1994) (refusing to allow statutory fees where no empirical data connected fees to impacts of development); *Trimen Development Co. v. King County*, 877 P.2d 187, 193-94 (Wash. 1994) (finding that statutory fee was proportional and directly related to the impact of the proposed development).

On the other hand, several jurisdictions ask whether general legislation substantially advances a legitimate governmental purpose but treat this question identically to due process rational basis review. *See, e.g., Texas Manufactured Housing Association, Inc. v. City of Nederland*, 101 F.3d 1095, 1104-05 (5th Cir. 1996) (rejecting heightened scrutiny in asking whether law prohibiting manufactured housing effected a regulatory taking), *cert. denied*, 521 U.S. 1112 (1997); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) (holding that *Nollan's* essential nexus requirement applies only to development exactions where there is a physical taking); *Department of Natural Resources v. Indiana Coal Council*, 542 N.E.2d 1000, 1003-1006 (Ind. 1989) (noting that *Nollan* "did not adopt any particular level of scrutiny to be applied across the board to all takings inquiries . . . ." *Id.* at 1005-06), *cert. denied*, 493 U.S. 1078 (1998); *Arcadia Dev. Corp. v. City of*

Bloomington, 552 N.W.2d 281 (Minn. Ct. App. 1996) (holding that wealth redistribution is a legitimate governmental purpose and thus ordinance which redistributes wealth substantially advances that purpose), *rev. denied*, 1996 Min. Lexis 795 (Minn., Oct. 29, 1996).

A few states limit *Nollan's* heightened scrutiny to exactions of a possessory interest in property. Illinois and Oregon reject the distinction between adjudicative and legislative determinations, but instead apply heightened scrutiny to governmental actions that do more than limit the use of property. *See, e.g., Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994) (interpreting *Dolan* standard); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390-91 (Ill. Ct. App. 1995) (adopting Thomas dissent in *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995)), *app. denied*, 667 N.E.2d 1055 (1996), *cert. denied*, 519 U.S. 976 (1996); *see also Chicago Title Ins. Co. v. Village of Bolingbrook*, 1999 U.S. Dist. Lexis 1347, at * 23-39 (N.D. Ill. 1999) (applying *Dolan* to development fees).

One commentator has described the law of judicial review of property cases as characterized by "significant disarray, if not anarchy." *See* Robert Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, An Analytic Framework, and a Synthesis*, 51 Wash. U.J. Urb. and Contemp. L. 1, 6 (1997). This confusion desperately requires clarification by this Court.

II. MOST CALIFORNIA RESIDENTS HAVE NO FORUM TO VINDICATE THEIR FEDERAL CONSTITUTIONAL RIGHTS.

The California Supreme Court's ruling in this case has greater impact than the typical state supreme court ruling on a federal constitutional issue, because in California it is already extremely difficult to bring these claims in federal court. As a result of several Ninth Circuit decisions, federal court review of property regulation is barely available in California. Thus, the California Supreme Court's interpretation of federal law is for all intents and purposes dispositive of rights asserted by property owners in California.

As pointed out by petitioners, when federal review is available, the Ninth Circuit recognizes the validity of claims that a regulation does not substantially advance a legitimate governmental interest and treats that analysis as different from rational basis review. *See Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 168 (1998); Petition for Writ of Certiorari at 24-25. Thus, a few property owners will succeed in navigating through the Ninth Circuit's procedural barriers. Those California residents will have a distinctly different standard of review than the majority of residents, who will be foreclosed from raising their constitutional claims in either federal or California courts.

The holdings in the Ninth Circuit profoundly discourage pursuing most federal takings claims in federal court. One Ninth Circuit decision holds that property owners may not seek injunctive relief against a property

regulation that does not substantially advance governmental interests. *See Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285-86 (9th Cir. 1997) (holding that in order to bring a claim in federal court that a regulation does not substantially advance a legitimate government, the property owner must first seek just compensation). Another Ninth Circuit opinion permits such challenges without first applying for compensation, but nevertheless abstained from hearing the challenge and deferred to the state courts. *See San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998); *see also Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 1386 (1998).[3] And finally, even if property owners reserve their federal claims when litigating their state claims in state court (as they undoubtedly must do when bringing an inverse condemnation action), they will still be collaterally estopped from going to federal court with their federal constitutional claims. *See Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 278 (1998). In short, there is little hope for a federal court hearing for California property owners seeking to vindicate their federal constitutional rights.

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[3] A facial challenge to a statute, alleging that it does not substantially advance the legitimate government interest, seems to be the only type of case that will occasionally survive to review on the merits in the Ninth Circuit. *See, e.g., Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 168 (1998); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 1386 (1998).

And now, the California Supreme Court has determined to give only rational basis review to property regulations that do not substantially advance a legitimate governmental interest. With an extremely limited federal forum, and the California courts refusing to enforce *Nollan's* admonition that substantial advancement review is stricter than rational basis, California property owners are left unable to protect their constitutional rights by arguing that property regulations do not substantially advance a legitimate governmental purpose. Except for individually-determined exactions, the decision below in essence overturns *Nollan* in California.

Many situations raise the question of whether property regulations substantially advance their governmental purpose. For example, San Francisco recently passed an ordinance permitting only one eviction from an apartment building for an owner to move in for the life of the building, no matter the circumstances and no matter how many building owners there might be. Precluded from coming to federal court, the owners of several apartment buildings have brought inverse condemnation claims in California state court. After the California Supreme Court's decision in this case, any takings clause claim is rendered virtually meaningless, identical to a minimal due process review. Whether or not there has been any violation of these owners' constitutional rights, the plaintiffs' claims are essentially foreclosed in both federal and now California courts.

CONCLUSION

This Court has held that property owners are entitled to a review of whether governmental action impinging on property rights substantially advances a legitimate governmental purpose. *See Nollan*, 483 U.S. at 834-37. Unless this Court accepts certiorari in this case, California property owners, unlike any other property owners in the country, will no longer be able to bring such takings claims. More significantly, the fragmented jurisprudence and doctrinal confusion on the proper standard of review for regulatory takings merits a grant of certiorari by this Court.

Respectfully submitted,

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